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No. 908

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

GEORGE EDWARD LEONARD,
Plaintiff,

vs.

THE UNITED STATES,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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GEORGE EDWARD LEONARD,
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vs.

THE UNITED STATES,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

George Edward Leonard of Kansas City, Missouri, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims.

OPINION BELOW.

The opinion of the Court of Claims in this case is reported in 145 F. Supp. 758.

JURISDICTION.

The date of the judgment of the Court of Claims and time of entry was November 7, 1956.

The order denying petitioner's motion for rehearing was made and entered January 16, 1957.

The jurisdiction of this Court to review by writ of certiorari is conferred by 28 U. S. C. A., Sec. 1255, 62 Stat. 928.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the government have any right to withhold the retired military pay of 1st Lieut. George Edward Leonard, U. S. A. F. Retired?

2. Whether retired officers of the Army of the United States may receive both military retired pay and government civilian pay which together amount to more than $3,000 a year.

3. Does the Veterans' Preference Act entitle plaintiff to both retired pay and government civilan pay which together amount to more than $3,000 a year?

4. Did the Court of Claims in rendering summary judgment for defendant err in holding that plaintiff as a matter of law was not a member of a reserve component of the Armed Forces of the United States?

5. Did the Court of Claims deny plaintiff a trial on a controverted issue of fact?

6. Does the summary judgment of the Court, one Judge dissenting, based on a single Government Exhibit (a purported discharge) deny plaintiff a trial on a con-

troverted issue of fact, as disclosed by the petition and response to motion for summary judgment establishing plaintiff's status as an officer retired for disability in line of duty, and thus deprive him of a fair hearing and deprive him of his property without due process of law?

7. Does the Court of Claims have jurisdiction to determine military status?

8. Did the Court of Claims exceed its statutory jurisdiction in making its ruling that the order of the Secretary of War for the retirement in grade of Lieut. George Edward Leonard did not confer retired military status as an officer? (Exs. J, K.)

STATUTES INVOLVED.

Section 212(a) of the Economy Act of 1932 (47 Stat. 406) provides in material part as follows (5 U. S. C. 59a (a)):

> After [June 30, 1932], no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37], at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

Section 5 of the Act of April 3, 1939 (53 Stat. 557, 10 U. S. C. A., Sec. 456), provides in material part:

> "That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service in the Regular Army."

The joint resolution of September 22, 1941 (55 Stat. 728) provides:

> "That during the present emergency, temporary appointments as officers in the Army of the United States may be made under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers, in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of a Brigadier General shall be made by the President alone, and general officers by and with the advice and consent of the Senate: provided, that any appointment made under the provisions of this act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: provided, further, that any person ap-

pointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officer's Reserve Corps of the same grade and length of active service: and provided further, that nothing contained in this act shall be construed to prohibit the appointment of officers in the various components of the Army of the United States in accordance with existing laws."

The Veterans Preference Act of June 27, 1944, 5 U. S. C. A., Secs. 851-869, provides in part:

Sec. 851: "In certification for appointment, in appointment, in reinstatement, in re-employment and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects and departments of the government, permanent or temporary * * * preference shall be given to (1) those exservice men and women who have served in active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans Administration, the Department of the Army or the Navy Department * * *."

Sec. 867: "All acts and parts of acts inconsistent with the provisions hereof are hereby modified to conform herewith and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by him under any existing law, executive order, civil service rule or regulation, of any department of the government or officer thereof."

Sec. 2 of the Act of July 1, 1947 (61 Stat. 238, 10 U. S. C. A., Sec. 371(b)), provides:

No existing law shall be construed to prevent any member of the reserve components of the Armed Forces from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the reserve components of the Armed Forces, nor as prohibiting him from practicing his civilian profession or occupation before or in connection with any department of the Federal Government.

Sec. 402 of the Act of October 12, 1949 (63 Stat. 816, 37 U. S. C. A., Sec. 272(i)), provides:

"All members of reserve components heretofore or hereafter retired or granted retirement pay because of physical disability shall be entitled to the same pay, rights, benefits and privileges provided by law or regulation for retired members of the regular services."

STATEMENT.

On August 17, 1942, plaintiff accepted a temporary appointment as a First Lieutenant in the Air Corps, Army of the United States, and thereafter served on active duty until April 18, 1943. Because of a service connected disability, plaintiff was retired in grade as a First Lieutenant, as an officer-member of the Reserve Components of the Armed Forces of the United States, with retirement disability pay. Petition, Par. 2, Exhibits 1, 2 and 3. Exhibits, B, C, D, J, K and L (Tr. 1, 49-51, 17-21, 32-35).

During his retirement plaintiff was employed by the United States as a civilian attorney for the following continuous periods:

June 16, 1943, until April 30, 1944, Petition, Pars. 3-4;

October 20, 1944, until January 12, 1947, Petition, Pars. 5-7;

October 21, 1947, until January 12, 1952, Petition, Pars. 8-9;

September 7, 1952, until June 12, 1953, Petition, Pars. 10-11.

Defendant failed and refused to pay plaintiff the amount of military retired pay during the above periods (Pet. Par. 12).

Plaintiff made claim for the retired military pay withheld by the United States in the General Accounting Office (Pet. Par. 13). (The date of this claim was November 4, 1954.)

On February 10, 1955, the Comptroller General, General Accounting Office of the United States, disallowed the claim (Pet. Par. 14). The disallowance was based on the conclusion that Army Reserve Officers retired for length of service were entitled to receive retirement pay while serving as a civilian employee of the United States, but that Army Reserve Officers retired for line of duty disability were not. The letter opinion of the Comptroller General is set out in the appendix (p. A8).

On May 2, 1955, this suit was filed in the Court of Claims to recover the retired military pay withheld during the periods of plaintiff's civilian employment.

Proceedings in the case were suspended at the request of the United States pending the government's petition for certiorari in *United States* v. *Tanner*. On October 10, 1955, this Court denied certiorari (*U. S* v. *Tanner*, 350 U. S. 842, 100 L. Ed. 60).

On February 15, 1956, the United States filed a motion for summary judgment on the alleged ground that plaintiff's military status was not the status of a member of an

Officers Reserve Component so as to entitle him to receive both military disability pay and government civilian salary in excess of the amount provided by the Economy Act of 1932, and on the additional ground that a part of the claim was barred by limitations.

On the controverted issue of fact as to plaintiff's military status the government relied on the terms of plaintiff's commission as an officer of the Army of the United States and a discharge issued before the United States determined that plaintiff's disability was service connected and before plaintiff was retired in grade by reason of his disability incurred as an incident of service.

On September 4, 1956, plaintiff filed his response to defendant's motion for summary judgment, with exhibits in support, establishing plaintiff's military status as an officer retired in grade for service connected disabilty.

Oral argument was had on October 1, 1956, before five members of the Court of Claims sitting in Washington, D. C.

The opinion of the Court of Claims was filed on November 7, 1956, granting defendant's motion for summary judgment and dismissing plaintiff's petition (Tr. 61-64).

Motion for rehearing was filed on December 6, 1956, and on January 16, 1957, the Court entered its order denying the motion for rehearing (Tr. 64).

JURISDICTION OF THE COURT OF CLAIMS.

The basis for Federal jurisdiction in the Court of Claims is that petitioner's claim is for disability retired military pay granted under the Act of April 3, 1939, 53 Stat. 557. The Court of Claims is given jurisdiction to determine claims against the United States arising under Acts of Congress. 28 U. S. C. A., Sec. 1491, 62 Stat. 940.

REASONS FOR ALLOWING THE WRIT.

I.

Great Importance of the Questions of Federal Law Involved.

II.

Petitioner's Claim Was Disallowed by the Court of Claims Without a Trial.

III.

The Veterans Preference Act Exempts Veterans' Pay from the Restrictions of the Economy Act.

IV.

The Court of Claims Erroneously Assumed That It Had Jurisdiction to Determine the Basic Question of Military Status of a Retired Officer.

V.

Baseless Discrimination Among Officers of the Army.

REASONS FOR ALLOWING THE WRIT.

I.

Great Importance of the Questions of Federal Law Involved.

1. The important question of federal law which petitioner believes should be decided by the Supreme Court is whether retired officers of the armed forces are entitled to receive military retired pay while they are receiving government civilian pay. The Court of Claims in *Tanner* v. *United States,* 129 Ct. Cls. 792, 125 F. Supp. 240, certiorari denied October 10, 1955; *United States* v. *Tanner,*

350 U. S. 842, 100 L. Ed. 60, held that Tanner, who had been commissioned as an Army Reserve Officer and placed on the retired list with entitlement to retired pay under the Act of June 29, 1948, 62 Stat. 1081, 1087, by reason of length of service was entitled to receive both military retired pay and government civilian pay. The Court of Claims in Leonard has held that Leonard, retired in grade as an officer of the Army of the United States by reason of disability incurred in line of duty, is not entitled to receive both military retired pay and government civilian pay. The conflict between these two decisions of the Court of Claims has created for both the United States and for retired officers confusion in the interpretation of the Federal law which should be resolved by the Supreme Court.

The claim at bar is a claim for military retired pay withheld by the United States during periods of civilian government employment. Every disabled military officer who has served in a civilian capacity and has had any military pay withheld would have a similar claim.

The General Accounting Office disallowed plaintiff's claim on the ground that plaintiff was retired under the Act of April 3, 1939, whereas Tanner was retired under the Act of June 29, 1948 (Appendix, p. A7).

In the companion case of 1st Lt. Howard J. Hess A. U. S. Retired, the General Accounting Office denied the claim for retired military pay on August 10, 1956, and ruled as follows:

> "The precise question involved in your case appears to be now before the Court of Claims in the pending case of *Leonard* v. *United States*, Ct. Cls. No. 182-55. You may, if you wish, bring a similar suit in the Court of Claims or you may await the outcome of the *Leonard* case before taking such action,

bearing in mind that the period of limitation for filing suits in the Court of Claims is six years (28 U. S. C. 2501). We anticipate taking no action on claims of this type, however, until the *Leonard* case, or a similar case, has been finally decided, and, if decided against the Government, until a determination is made here as to the extent such decision will be followed in settling claims and adjusting accounts."
(Appendix, p. A10.)

The basis of this distinction between officers retired for disability and officers retired for length of service, has no foundation in the Acts of Congress referred to, and accordingly the difference in treatment cannot be justified.

Petitioner was commissioned a First Lieutenant under the Act of September 22, 1941, which states that "any person appointed an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges and benefits as members of the Officers' Reserve Corps of the same grade and length of active service."

The Act of April 3, 1939, under which it is conceded that plaintiff is entitled to receive military retirement pay provided that officers of the Army of the United States who suffer disability in line of duty from diseases or injuries shall be in all respects entitled to receive the same retired pay as officers of the regular army.

The Act of July 1, 1947 provides that no existing law shall be construed to prevent any member of the Officers' Reserve Corps from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to Officers of the Reserve Corps. Since the United

States conceded in its motion for summary judgment that plaintiff's status as an officer commissioned as a member of the Army of the United States gave him the equivalent status of an officer commissioned as a member of the Officers' Reserve Corps and the laws above referred to so state, we believe there is no conceivable basis for penalizing officers disabled in line of duty by withholding their military pay.

II.

Petitioner's Claim Was Disallowed by the Court of Claims Without a Trial.

The decision of the Court of Claims denies petitioner and others similarly situated the right to military retired pay by summary judgment based upon an assumption that plaintiff was not retired but was discharged. The decision violates the traditional concept of the judicial process that controverted issues of fact shall be determined upon trial. That plaintiff is and was during the period in question a retired officer is shown by the record in this case, the Exhibits 1, 2, and 3 (Tr. 49-51), Exhibits B, C, D, J, K and L (Tr. 17-21, 32-35), letter of the Comptroller General (Appendix, p. A8) and by the significant fact that if petitioner were not a retired officer he would not under the law be entitled to retired military pay, the withholding of which is the basis of this claim. The single exhibit upon which the Court of Claims has denied plaintiff relief was a discharge issued on the basis of an interim determination later revoked, that petitioner's disability was not service connected. The Court of Claims has thus determined petitioner's status non-military on summary judgment conversely to the government's determination that petitioner is a retired officer, a determination which the government has recognized for a period of thirteen years.

III.

The Veterans Preference Act Exempts Veterans' Pay from the Restrictions of the Economy Act.

The Veterans Preference Act of June 27, 1944, was not considered or construed by the Court of Claims. Although presented to the Court below in plaintiff's petition filed May 2, 1955, as a basis for plaintiff's claim and in plaintiff's response to defendant's motion for summary judgment and in plaintiff's written and oral argument, the decision does not mention or consider the effect of the Act in its effect on the Economy Act of 1932.

The whole purpose and intendment of the Act is to give preference in Government employment to veterans such as plaintiff without forfeiture or penalty or loss of rights to which veterans including plaintiff are entitled.

Thus the Court below has failed to consider an important federal law pertinent to plaintiff's claim and the rights of countless other veterans similarly situated.

IV.

The Court of Claims Erroneously Assumed That It Had Jurisdiction to Determine the Basic Question of Military Status of a Retired Officer.

The determination of military status for all individuals in military service, both active and retired, is the responsibility of the Executive and Legislative Departments of the Government. In the case at bar the retired military status of Lieut. George Edward Leonard was determined by the order of the Secretary of War which directed that he be retired by reason of physical disability in grade as a First Lieutenant and his name placed on the appropriate retired list. *Exhibit K. Tr. 33-34.* The claim for money asserted

in the Court of Claims is for military pay withheld so that the military status of Lieut. Leonard as a retired officer was not a basic issue in the case and the Court of Claims was misled in assuming erroneously that it was an issue for its determination.

V.

Baseless Discrimination Among Officers of the Army.

The novel and startling effect of the decision of the Court below in its construction of the federal statutes is to exempt from the dual compensation restriction officers retired because of length of service but not officers disabled in line of duty, retired officers holding original commissions in the Reserve Corps but not retired officers holding original commissions in the Army of the United States. This decision and judgment, however, is contrary to the express language of the Act of September 22, 1941, which placed officers of the Army of the United States on an equal status for all purposes with officers of the Reserve Corps.

The decision and summary judgment of the Court of Claims departs from the accepted and usual course of judicial proceedings in deciding a real and substantial issue of fact on *ex parte* untested exhibits without the time honored right of testing their probative value or presenting counterbalancing evidence.

The decision rules out the application of the Veterans Preference Act to plaintiff's claim by silence.

The decision holds in effect that the type of Commission determines the rights of retired officers to exemption from dual compensation restrictions despite the express language of the Congress giving to all classes of officers the same rights and benefits.

CONCLUSION.

For the foregoing reasons it is respectfully submitted the petition for writ of certiorari should be granted.

RICHARD T. BREWSTER,
600 Waltower Building,
Kansas City, Missouri,
Counsel for Petitioner.

GEORGE EDWARD LEONARD,
of Counsel.

April 15, 1957.

VI. OPINION OF THE COURT BY JONES, CHIEF JUDGE.

IN THE UNITED STATES COURT OF CLAIMS
No. 182-55

(Decided November 7, 1956)

GEORGE EDWARD LEONARD v. THE UNITED STATES

Mr. Richard T. Brewster for the plaintiff.

Mrs. Sondra K. Slade, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JONES, *Chief Judge,* delivered the opinion of the court:

On August 17, 1942, plaintiff was given a temporary commission as a first lieutenant in the Army of the United States, for the duration of the war and six months thereafter, unless sooner terminated.

In April 1943 plaintiff was found by an Army Retiring Board to be physically incapacitated for active service, that his disability was not service connected, and he was accordingly on May 3, 1943, issued an honorable discharge (effective on that date) for physical disqualification.

On March 8, 1945, an Army Retiring Board set aside the previous findings, including the finding that plaintiff's incapacity was not the result of an incident of the service, and on March 10, 1945, the Secretary of War approved the findings of March 9, [sic] 1945, of the Retiring Board and directed that plaintiff be certified to the Veterans Admin-

istration as entitled to retirement pay under the act of April 3, 1939 (53 Stat. 555, 557).

Since his discharge plaintiff has held various positions as a civilian employee of the Government. During these periods of employment plaintiff's retirement pay has been withheld under section 212 (a) of the Economy Act of 1932, (47 Stat. 406), which forbids, *inter alia*, a civilian employee from drawing retired pay on account of service as a commissioned officer in excess of the amount necessary to make that amount plus his salary as civilian equal to $3,000 per annum.

Concededly plaintiff is subject to this limitation unless it has been repealed or unless he is exempt from its provisions.

That it has not been repealed is evident from the fact that section 212 was on August 4, 1955, amended by section 2 of Public Law 239, 84th Congress, 1st session, 69 Stat. 498, simply by raising the limitation to a higher amount, thus recognizing that the limitation was still in effect. The terms of that amendment are not applicable here.

The only other basis of recovery is plaintiff's claim that his status is that of a retired member of the Officers' Reserve Corps and that he is therefore entitled to the provisions of the act of July 1, 1947, 61 Stat. 238, 239 (10 U. S. C. 371 (b)),

> * * * No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps and Enlisted Reserve Corps, nor as pro-

hibiting him from practicing his civilian profession or occupation before or in connection with any department of the Federal Government.

Plaintiff cites as authority this court's decision in *Tanner* v. *United States*, 129 C. Cls. 792. This officers' reserve corps named in the above-quoted statute and cited in the *Tanner* case, was the Officers' Reserve Corps of the Army.

Plaintiff alleges that since he was discharged from the Army Air Force because of an incapacity which a retiring board first found was non-service connected and which finding was later reversed and vacated and plaintiff certified to the Veterans Administration for retirement pay, he automatically becomes a member of the reserve component and therefore entitled to the exemption stipulated in section 371 (b) *supra*.

We do not think this particular provision of the statute applies to him nor that he can be regarded as a member of any reserve component.

The statute, section 371 (b), *supra*, serves to exempt longevity retired members of reserve components from the dual compensation restriction of section 212 (a) of the Economy Act of 1932.

Because of his absolute discharge from the armed services by reason of physical disability plaintiff is not a member of the Officers' Reserve Corps.

Plaintiff asserts that he is of the belief that he is at present and has been at all times since his discharge from the armed services on May 3, 1943, a member of a reserve component since his name is carried on the AFUS retirement list. In the first place, the retirement list contained in that register "consists of those Air Force officers of other than the Regular Air Force who are granted retired pay

under provision of law." (Air Force Register, January 1, 1956, p. 603.) This register, established pursuant to section 301 (a) of Title III of the act of June 29, 1948 (62 Stat. 1087), contains a list of those who hold or have held commissions and who are drawing retired pay.

Plaintiff was discharged on May 3, 1943. He was not retired nor released to inactive duty, but discharged from his commission as lieutenant and fully released from the armed services. He was no longer subject to any form of military discipline and could not be called back to serve as an officer without first being appointed by the President.

The subsequent reversal of the Retiring Board's action holding that plaintiff had a non-service connected disability and the holding that it was service-connected, did not confer upon plaintiff any status as an officer. He remained a civilian and was simply entitled to the retired pay of an officer who was discharged because of physical disability, service-connected. *McBlair* v. *United States*, 19 C. Cls. 528. He was granted retirement pay in accordance with the act of April 3, 1939, *supra*, as of the date of his discharge. Since May 3, 1943, he has had no connection with the armed services other than his right to compensation for a disability he incurred while serving on military duty.

It is manifest, therefore, that plaintiff, unlike Tanner, has not since his discharge been a member of a reserve component.

The record is such as to make the essential facts indisputable, and it would be a waste of time and an added expense to both plaintiff and defendant to refer the case to a trial commissioner for hearing.

The defendant's motion for summary judgment is granted and the petition is dismissed.

LARAMORE, *Judge*; MADDEN, *Judge*; and WHITAKER, *Judge*, concur.

LITTLETON, *Judge*, dissents.

VII. PROCEEDINGS FOLLOWING OPINION OF THE COURT.

On December 6, 1956, plaintiff filed a motion for rehearing.

On January 16, 1957, the court entered the following order on said motion:

* * * * * * * * *

182-55 GEORGE E. LEONARD

* * * * * * * * *

ORDER

These cases come before the court on plaintiffs' motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this Court and, on consideration thereof,

IT IS ORDERED this sixteenth day of January 1957, that said motions be and the same are denied.

BY THE COURT

/s/ Marvin Jones

MARVIN JONES

Chief Judge.

SETTLEMENT CERTIFICATE.

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON 25, D. C.

In correspondence
please refer to:

Division: Claims
Claim No.: Z-1281737

FEB. 10 1955
(Date)

George Edward Leonard, Jr., 1st Lt., AUS, Retired,
1100 Columbia Bank Building,
921 Walnut Street,
Kansas City 6, Missouri.

Sir:

Your claim for retired pay as first lieutenant, Army of the United States, service No. 0-914 948, believed to have been erroneously withheld while employed as a civilian by the United States Government for intermittent periods from June 12, 1943 to June 12, 1953, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

The records show that you were retired April 19, 1943, as a first lieutenant, by reason of physical disability, under the provisions of the Act of April 3, 1939, 53 Stat. 557; and you state that you were employed as a civilian by the United States Government from June 12, 1943 to May 1, 1944; August 21, 1944 to January 12, 1947; October 20, 1947 to January 12, 1952; and September 5, 1952 to June 12, 1953.

Section 212 of the Act of June 30, 1932, 47 Stat. 406, provides that after June 30, 1932, no person holding a civilian office or position, appointed or elective, under

the United States Government, shall be entitled during the period of such incumbency, to retired pay from the United States for or on account of such services, as a commissioned officer of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000.00, except in cases of regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States.

While you have not so stated, it appears that your claim is based on a recent decision of the United States Court of Claims, in the case of Tanner v. United States, No. 543-53, decided November 2, 1954, which held that Army Reserve officers (retired under the provisions of Title III, Public Law 810, approved June 29, 1948, 62 Stat. 1087), who are entitled to retired pay can receive such pay even though holding a position as a civilian employee with the United States Government with compensation in excess of $3,000.00 or more per annum. However, that matter is still in litigation, and since it applied to officers retired under the provisions of Title III, Public Law 810, supra, it would have no application to your case since you were retired under the Act of April 3, 1939, 53 Stat. 577.

I therefore certify that no balance is found due you from the United States.

Respectfully,

Comptroller General
of the United States
By: Carl E. Hylman

COMPTROLLER GENERAL'S LETTER.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-128161 AUG. 10, 1956

First Lieutenant Howard J. Hess, AUS, Retired
1621 North Franklin Place
Milwaukee 2, Wisconsin

Dear Lieutenant Hess:

Reference is made to your letter of May 27, 1956, further concerning your claim for retired pay as first lieutenant, Army of the United States, from August 6, 1945, to August 3, 1955, based on the opinion in the case of Tanner v. United States, 129 C. Cls. 792.

You refer to our settlement dated May 17, 1956, and say that inasmuch as the United States Supreme Court stated in effect that retired reserve officers who are employees of the Government are not bound by any dual compensation restrictions, you are greatly disappointed on the disallowance of your claim. You inquire as to any further action which may be taken by you.

In its opinion of November 2, 1954, in the case of Tanner v. United States, 129 C. Cls. 792, the Court of Claims concluded that the plaintiff, who was held or assumed to be a member of the Officers' Reserve Corps, was entitled to concurrent payments of retired pay under Title III of the act of June 29, 1948, 62 Stat. 1087, and Federal civilian compensation, without regard to the dual compensation restrictions of section 212(a) of the Economy Act of June 30, 1932, 5 U. S. C. 59a, because of the provisions of section 1(b) of the act of July 1, 194., 61 Stat. 239, which, as amended by section 804 of the act of

July 9, 1952, 66 Stat. 506, effective January 1, 1953, permit a member of a reserve component to be employed in any civil branch of the public service and to receive the pay incident to such employment "in addition to any pay and allowances to which he may entitled under the laws relating to the reserve components of the Armed Forces." The defendant's petition for a writ of certiorari in that case was denied by the Supreme Court of the United States on October 10, 1955.

We accept and follow the court's opinion in the Tanner case as a precedent for retroactive and prospective payment of military retired pay (in addition to civilian compensation) in those cases where the claimant, being otherwise entitled, has been, or may be, granted retired pay under Title III of the act of June 29, 1948, and has been a de jure member of a reserve component of the Armed Forces during the period covered by the payment, provided that for any period prior to January 1, 1953, payment will be approved only if the claimant was a de jure member of the Officers' Reserve Corps or the National Guard during the period involved, since members of other reserve components were not brought within the provisions of the 1947 act until that date. 35 Comp. Gen. 497.

It appears that you were granted retirement pay for physical disability, effective from August 6, 1945, as a first lieutenant, Army of the United States, under the provisions of the act of April 3, 1939, 53 Stat. 557, but that your disability was not incurred in combat with an enemy of the United States and did not result from an instrumentality of war. Thus your case was not one which, under the provisions of section 212(b) of the Economy Act of June 30, 1932, was exempted from the restrictions of

section 212(a) of that act. Since you were not at the time of your retirement and never had been a member of any Officers' Reserve component, the holding in the Tanner case is not for application in your case.

The precise question involved in your case appears to be now before the Court of Claims in the pending case of Leonard v. United States, C. Cls. No. 182-55. You may, if you wish, bring a similar suit in the Court of Claims or you may await the outcome of the Leonard case before taking such action, bearing in mind that the period of limitation for filing suits in the Court of Claims is six years (28 U. S. C. 2501). We anticipate taking no action on claims of this type, however, until the Leonard case, or a similar case, has been finally decided, and, if decided against the Government, until a determination is made here as to the extent such decision will be followed in settling claims and adjusting accounts.

Very truly yours,

JOSEPH CAMPBELL
Comptroller General
of the United States

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 908

GEORGE EDWARD LEONARD, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. A1-A5) is reported at 145 F. Supp. 758.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1956. Petitioner's timely motion for a rehearing was denied on January 16, 1957. The petition for a writ of certiorari was filed on April 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner did not come within the class of officers specifically exempted, under that court's decision in *Tanner* v. *United States*,[1] from the dual compensation restrictions of the Economy Act of 1932.

STATUTES INVOLVED

At all times here material, Section 212 of the Economy Act of 1932, 47 Stat. 406, 5 U.S.C. 59a(a), provided, in pertinent part:

> (a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in the Army of the United States, * * * at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. * * *.

Section 1b of the Act of July 1, 1947, 61 Stat. 238, 10 U.S.C. (1946 Ed. Supp. I) 371b, provided, in pertinent part:

> No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor

[1] 129 C. Cls. 792, certiorari denied, 350 U.S. 842.

from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps and Enlisted Reserve Corps, * * *.

STATEMENT

On August 17, 1942, petitioner accepted a temporary appointment as a 1st Lieutenant, Air Corps, Army of the United States,[2] and served on active duty until April 18, 1943 (Complaint, par. 2). On May 3, 1943, petitioner was honorably discharged for reasons of disability (Complaint, par. 2). At the time of his discharge, petitioner was found not entitled to disability retired pay on the ground that his disability was not an incident of service (Complaint, par. 2). The finding as to the source of petitioner's disability was changed by an Army Retiring Board in 1945 and petitioner was, accordingly, certified as entitled to retired pay under the Act of April 3, 1939, 53 Stat. 555, 557 (Complaint, par. 2).

Petitioner, after his discharge in 1943, was intermittently employed by the United States in various civilian capacities during the period 1943 to 1953 (Complaint, pars. 3-11). During these periods of intermittent employment by the United States, petitioner's military retired pay was withheld under the provisions of Section 212 of the Economy Act of 1932, 47 Stat. 406, 5 U.S.C. 59a(a) which prohibited receipt

[2] Petitioner's commission was conferred by authority of H. J. Res. 199, September 22, 1941 (55 Stat. 728) which authorized the temporary appointment of commissioned officers by the President, all appointments so made to continue "during the present emergency [the then-approaching World War II] and six months thereafter" unless sooner terminated.

of retired pay for or on account of service as a commissioned officer by a Federal civilian employee where his civilian pay and military retired pay would exceed $3,000 per annum.

For the pay thus withheld, petitioner, on May 2, 1955, brought suit in the court below. The basis of the claim was that the Veterans' Preference Act of 1944[3] repealed Section 212 of the Economy Act of 1932 and that, additionally, the latter statute was unconstitutional (Complaint, pars. 15, 17-21). Neither of these contentions was substantial[4] and the Government, moving for summary judgment, treated the complaint as raising the question whether petitioner's claim was within the exemption to Section 212 of the Economy Act created by the Act of July 1, 1947, and recognized by the *Tanner* decision. The Court of Claims sustained the Government's position that petitioner was not within the exempted class and dismissed the complaint.

ARGUMENT

Section 212 of the Economy Act, *supra*, p. 2, prohibits the receipt of " * * * retired pay * * * for or on account of services as a commissioned officer * * * " by a Federal civilian employee if the retired pay combined with civilian salary exceeds the statu-

[3] 58 Stat. 387, 5 U.S.C. 851, *et seq.*

[4] Neither here, where the contention is reiterated (Pet. 13), nor in the court below, has petitioner supported his general assertion that the Veterans Preference Act of 1944 repealed Section 212 of the 1932 Act. Nor could he. There is nothing in the Veterans Preference Act which purports to work such a repeal. The opposite Congressional understanding is shown by the reenactment of Section 212, in 1955, for the purpose of raising the $3,000 limitation to $10,000. 69 Stat. 498. Petitioner's additional claim, that Section 212 as applied to him is unconstitutional, has long since been put at rest. *Lynch* v. *United States*, 292 U.S. 571, 577.

tory limit. In *Tanner* v. *United States,* 129 C. Cls. 792,[5] the Court of Claims held that the Act of July 1, 1947, *supra,* p. 2, created an exception to this dual compensation restriction for " * * * member[s] of the Officers' Reserve Corps * * *." The single issue in this case is whether petitioner comes within the excepted class.[6]

The Court of Claims correctly resolved this issue against petitioner. Recognizing that the only possible basis of recovery was membership in a reserve component for the periods in suit, the court below held that, after his discharge on May 3, 1943, petitioner had no further connection with the military (Pet. App. A3-A4). See also *McBlair* v. *United States,* 19 C. Cls. 528, 539.

Petitioner does not appear to challenge the ruling below as to the scope of the *Tanner* decision. Rather, he urges that there was a triable issue of fact which was incorrectly resolved by the court on motion for summary judgment. There is no merit to this narrow contention. The question whether petitioner ceased to be a member of the military in 1943 can be resolved only by examination of the documents pertaining to his military career. Duly certified copies of the pertinent documents, including petitioner's

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[5] This Court denied the Government's petition for certiorari. 350 U.S. 842.

[6] There is no substance to petitioner's suggestion that the decision below discriminates between those officers entitled to disability retired pay and those entitled to longevity retired pay (Pet. 14). Officers entitled to either type of retired pay fall within the scope of the *Tanner* decision if members of a reserve component for the period in question. See, *e.g., Joseph L. Madden* v. *United States,* C. Cls. No. 454-55, in which the Government has consented to the entry of a judgment in favor of a disability-retired reserve officer.

commission and his honorable discharge orders, were before the court on the Government's motion. The court below found the operative facts to be indisputable (Pet. App. A4).

CONCLUSION

The decision of the Court of Claims is correct. No important question or conflict of decisions is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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